
Equal Employment Opportunity: Rights and Responsibilities

Welcome to this training on Equal Employment Opportunity in New York State Government. I'm Shauna and I want to speak with you about your rights and responsibilities as an employee of the state.

New York State has long been committed to ensuring that all individuals have an equal opportunity to enjoy a fair, safe, and productive work environment. Laws and policies help ensure that diversity is respected and that everyone can enjoy the privileges of working for New York State. This course will help you better understand your role in helping the state meet this objective.

Equal Employment Opportunity

All state employees have the right to work in an environment free from discrimination. We also have the responsibility to assure that our actions do not contribute in any way to a discriminatory environment in the workplace.

This course is intended to provide employees with information on their rights and responsibilities under applicable laws and policies. These laws and policies include the New York State Human Rights Law, federal antidiscrimination laws, other state laws covering specific areas of concern, and the Governor's Executive Orders applicable specifically to state employees.

Course Overview

New York State's Human Rights Law provides broad protections against discrimination. It applies to all employees in New York State, including state employees.

In this course, you will take a look at each of the areas in which you are protected from discrimination.

For additional information on the topics covered in this course, including which laws and policies apply to each protected area, click here to download the publication [Equal Employment Opportunity in New York State: Rights and Responsibilities: A Handbook for Employees of New York State Agencies](#) (hereafter "Handbook").

Equal Employment Opportunity in New York State: Rights and Responsibilities: A Handbook for Employees of New York State Agencies - http://www.goer.ny.gov/Employee_Resources/employee_handbook/2011Employee_Handbook.pdf
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What is Protected?

Let's see if you know what characteristics are protected. Select from below all the possible characteristics of New York State employees for which there is protection against discrimination.

- Age
- Creed
- Disability
- Domestic Violence Victim Status

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- Gender Identity
 - Marital Status
 - Military Status
 - National Origin
 - Predisposing Genetic Characteristics
 - Previous Conviction Records
 - Prior Arrest Records
 - Race and Color
 - Sex
 - Sexual Orientation

New York State employees are protected from discrimination based on all of the listed characteristics.

Persons who share a particular protected characteristic are sometimes referred to as a “protected class,” a term that is sometimes used in this training and in the *Handbook*.

What is Discrimination?

Discrimination occurs when:

- Employment decisions are made based on protected characteristics.
- Individuals are at a disadvantage because of biased attitudes about their protected characteristics.
- Individuals are harassed because of their protected characteristics.

Nondiscrimination means:

- All individuals have an equal opportunity to obtain and advance in state employment.
- That employment decisions are based on an individual’s merit, skills, and qualifications, and not on protected characteristics.
- That employees can work in an environment free from bias.

What kinds of actions are discriminatory?

Discrimination occurs when negative employment actions are based on a protected characteristic, including the following:

- A decision affecting hiring, promotion, discipline, or firing
- Putting an employee at a disadvantage with regard to a term, condition, or privilege of employment
- Harassment

Perceived Status

It is also discrimination if negative employment actions are taken on the basis of “perceived” characteristics, such as someone perceived to be gay, disabled, or of a particular national origin, whether true or not.

Affirmative Duties

The state as your employer has certain affirmative duties in some areas, including reasonable accommodation of the following:

- Disability
- Certain religious requirements or practices
- Military obligations
- Certain needs of victims of domestic violence

These will be discussed in more detail later in this training.

What is Harassment?

Harassment is a form of discrimination that consists of words, signs, jokes, pranks, intimidation, or physical violence that is directed at an employee due to any protected characteristics, which are set out in the Handbook and are discussed in this course. It includes offensive behavior based on stereotypes about a protected class and behavior that is intended to cause discomfort or humiliation because of protected characteristics. Harassment is unlawful when it becomes severe or frequent enough to alter the terms or conditions of an individual's employment.

Sexual harassment is a particular type of harassment and will be discussed more in the section of this training on sex discrimination.

Supervision vs. Harassment

Appropriate supervision is *not* harassment.

Normal workplace supervision is not harassment, even if it is negative or upsetting to the employee. Of course, if a supervisor treats an employee differently because of a protected characteristic, with regard to job duties, evaluations, or discipline, this may be discriminatory.

What Should You Do?

State employees are entitled to a work environment which promotes respect for all.

If you see or experience behavior in the workplace that demonstrates bias, harassment, or prejudice, you should report it to a supervisor, manager, or the agency's Affirmative Action Officer.

State employees are prohibited from engaging in harassing behaviors towards others in the workplace.

Supervisors have special obligations to report harassment.

Reporting Harassment

Your employer cannot stop harassment in the workplace unless management knows about the harassment. Harassment should be reported to a supervisor, manager, or Affirmative Action Officer.

Individuals who report or experience harassment need to cooperate with management so that a full and fair investigation can be conducted, and any necessary corrective action can be taken.

The Supervisor's Responsibility

Supervisors must report any harassment that they observe or know of, even if no one is objecting to the harassment.

If supervisors have questions about whether behavior that they have observed or learned about constitutes harassment they should consult with their agency's Affirmative Action Officer.

If a supervisor or manager receives a report of harassment, or is otherwise aware of harassment, it must be promptly reported to the agency, without exception, even if the supervisor or manager does not believe that the conduct constitutes harassment, or the harassed individual asked that it not be reported.

Investigation and Corrective Action

Your agency has the duty to investigate all reports of harassment. If it is determined that harassment is occurring, the agency has a duty to take prompt and effective corrective action to stop it. The agency also has a duty to ensure that harassment will not occur in the future.

Human Rights Law and Equal Employment Opportunity

Federal law and the New York State Human Rights Law prohibit employers from discriminating based on certain protected characteristics.

These categories are protected from discrimination under New York State and federal law:

1. Race and Color
2. National Origin
3. Creed
4. Sex
5. Age
6. Disability
7. Predisposing Genetic Characteristics

These categories are also protected from discrimination under New York State law:

1. Sexual Orientation
2. Marital Status
3. Favorably Resolved Arrest Records, Youthful Offender Status, Sealed Records
4. Prior Conviction Records
5. Military Status
6. Domestic Violence Victim Status
7. Gender Identity (State employees are protected by Executive Order.)

Because the New York State Human Rights Law is broader than federal law, we will focus largely on state law as we take a closer look at each of these protections.

Age

The Human Rights Law protects persons 18 and older from age discrimination, unlike federal law which protects only those 40 and older.

Decisions about hiring, job assignments, or training cannot be made based on assumptions about how an employee's age affects his or her ability or willingness to learn or undertake new tasks and responsibilities.

Most age discrimination involves making employment decisions based on the belief that the individual is "too old" for the job. However, an employment decision based on a perception that a person is "too young," may be discriminatory, although basing a decision on lack of experience or qualifications is not discriminatory.

Ageist remarks must be avoided in the workplace.

Retirement

Mandatory retirement of employees at any specific age is generally prohibited. However, retirement plans may contain an age component for eligibility. For example, retirement plans may require that individuals reach a certain age, or have some combination of age and years of service, before being eligible for retirement benefits.

Incentive programs aimed at reducing the size of the workforce by granting employees greater than normal retirement benefits are generally considered lawful. Being eligible for early retirement is not coercion based on age. Making employees ineligible for a retirement benefit or incentive because they are too young is not discriminatory.

However, employees eligible for retirement, via an incentive program or otherwise, must not be urged to retire.

Exceptions

There are certain exceptions permitting age-based eligibility and mandatory retirement rules, mainly applying to police officers, peace officers, and corrections officers. Please see the Handbook for more details.

Scenario: The Promotion

Wesley, age 55, has two years of management experience while Taylor, who is 36, has eight. They both interview for the same position in their agency. When Wesley learns that Taylor was offered the job, he immediately assumes that he was overlooked because he is nearing retirement age. He asks about the decision and is told that Taylor was selected because he had more management experience.

Was the employer's decision to hire Taylor over Wesley discrimination?

No, this is probably not discrimination.

It is correct that this is probably not age discrimination. The agency had a legitimate reason to promote Taylor instead of Wesley, namely Taylor's greater management experience. If Wesley believes that his age was a factor, he can contact his Affirmative Action Officer. However, unless Wesley or the investigation provides evidence that Taylor's superior qualifications were not the real reason Taylor was promoted, then there will be no basis for a claim of age discrimination.

Race and Color

There is no objective standard for determining an individual's racial identity. Therefore, the state defers to an individual's self-identification as a member of a particular race.

Color can be an independent protected class based on the color of an individual's skin, irrespective of his or her race.

Discriminating against an individual because of his or her ancestry or ethnic characteristics also can be considered racial discrimination in some cases.

Scenario: A Stalled Career

Howard, who is black, works in an agency location where all of the other employees are white. After some years working for the agency, Howard has noticed that others, who have experience similar to his own, have been promoted on more than one occasion, while he has received no promotion and has never been asked about his interest in promotion. The positions have not been posted, and Howard only finds out that the positions are to be filled when the promotions have already occurred. Howard has an excellent time and attendance record and has always received satisfactory evaluations.

Could discrimination be the reason that Howard has not been promoted?

Yes, this could be discrimination.

Although Howard has no obligation to file a formal complaint, the circumstances are sufficiently suggestive of racial discrimination that he should consider contacting his agency's Affirmative Action Officer. Race discrimination can be subtle and can occur without overt evidence of discrimination. Available positions should be posted, and every employee who meets the basic qualification should have an opportunity to compete for the positions. Even if an investigation finds that no discrimination has actually occurred in this case, the method of filling positions should be changed to conform to proper practices to assure equal opportunity for all.

Sabbath or Holy Day Observance

An employee is entitled to time off for religious observance of a Sabbath or holy day in accordance with the requirements of his or her religion. Time off may be denied if it imposes an undue hardship on the employer. Time off should also be granted to allow for a reasonable amount of travel time before and after the observance, if requested by the employee.

The Human Rights Law provides that any such absence, in the reasonable judgment of the employer, can be made up by an equivalent amount of time and work at a time agreed to by the

employer and employee, or can be charged against any appropriate leave accruals. Any absence not made up or charged may be treated by the employer as leave without pay. Time off for religious observance may not be charged to sick leave.

Supervisors should consult with management, or the Affirmative Action Officer, and/or Agency Counsel, whenever questions arise regarding time off for religious observance, and should not deny a request without such consultation.

Religious Observance or Practices

An employee who, in accordance with his or her religious beliefs, observes a particular practice or manner of dress, hairstyle, or beard should not be unreasonably required to compromise his or her practice in the workplace. Where the observance conflicts with a safety or grooming standard or other workplace rule, the employer should seek a way to accommodate the observance by making a reasonable exception to the rule.

Request for Accommodation

Employees needing accommodation of religious observance or practice should clearly state the religious nature of their request and collaborate with their employer to reach a reasonable accommodation. Supervisors should consult with Human Resources or Agency Counsel, or the agency's Affirmative Action Officer, as necessary, with respect to requests for accommodation of religious observance or practices.

Scenario: Religious Observance in Balance

Akhil, a Sikh man, requests time off for Vaisakhi, a religious holiday. He makes his request two days before the start of the holiday. His supervisor checks the schedule for available personnel and also asks for volunteers, but she is unable to find someone to cover the shift. Without a suitable replacement, the unit cannot provide critical care to patients residing in the unit. The supervisor tells Akhil, "I'm sorry, I can't find anyone who is able to cover your shift. You need to come in to work that day."

Is the supervisor's decision discriminatory?

No, this was probably not discriminatory

Employers must make a good faith effort to allow employees to take requested time off for religious holidays. If granting the request would mean that the unit would not be able to function properly with regard to critical functions, such as patient care, then the request can be denied after a reasonable effort has been made to provide coverage with other available employees, including seeking volunteers. However, in ordinary circumstances where there is simply a lot of work backed up or the office is shorthanded, it would not be appropriate to deny leave for a holy day observance.

National Origin

National origin includes ancestry, so an individual born in the United States is protected against discrimination based on his or her ancestors' nationality. The state defers to an employee's self-identification as a member of a particular national or ethnic group.

Language

Fluency in English may be a job requirement. However, requiring that a person speaks English as his or her native language may be considered national origin discrimination. The only lawful requirement is for a level of English fluency necessary for the job.

Requiring employees to speak English at all times in the workplace may be national origin discrimination. Any specific rule about language use must be reasonable, necessary for the efficient conduct of the worksite, and be clearly communicated to employees before being enforced.

Requiring fluency in a language other than English for employment in bilingual positions is not discriminatory. Determinations of fluency must be based on an individual's ability and not his or her national origin.

Citizenship

All New York State employees hired after November 6, 1986 must be able to complete a verified federal Form I-9, which establishes the employee's identity and eligibility for employment in the United States. Withdrawing an offer of employment or terminating employment based on lack of current employment authorization is required by federal law and is not discriminatory.

Citizenship Requirements

Employees serving in positions designated as public offices, as well as peace and police officer positions defined in New York State Criminal Procedure Law, must be United States citizens.

Scenario: Challenging Stereotypes

Arturo, a unit supervisor, is meeting with his team. He says he needs someone to lead a team assigned to a demanding project. Yinan, who is Chinese, eagerly raises her hand, saying she would be happy to take the lead. Arturo replies, "You people are too quiet. I need someone I know will be assertive." He then picks someone else to lead the project.

Yinan should realize that her supervisor knows best and wait for a project that suits her better.

False.

Employers may not discriminate based on stereotypes about national origin. Arturo expressed bias against Yinan because he used stereotypes about Chinese individuals, and possibly also her gender, when deciding to deny her the opportunity to lead the project instead of making the decision based on her ability to do the job. Yinan should report the incident to her agency's Affirmative Action Officer.

Sexual Orientation

Sexual orientation refers to being heterosexual, gay or lesbian, bisexual, or asexual, whether actual or perceived.

Same-sex Spouses

The New York State Marriage Equality Act, signed by Governor Andrew M. Cuomo on June 24, 2011, authorizes the marriage of same-sex couples in the State of New York. New York also recognizes marriages between same-sex couples performed anywhere such marriages are valid.

State employees will receive the same spousal benefits regardless of the gender of their spouse.

Discriminating against an employee married to a spouse of the same-sex, or failing to offer him or her equal benefits, is prohibited.

Domestic Partners

An employee with a domestic partner, whether same-sex or opposite-sex, may also qualify for benefits. The employee and his or her partner can fill out the Application for Domestic Partner Benefits and Affidavit of Domestic Partnership and Financial Interdependence to see if they qualify.

Scenario: An Atmosphere of Disrespect

Darnell is a stylish, handsome man who doesn't share many details of his personal life with his coworkers. Kristi, who has a well-known crush on Darnell, flirts with him but is frustrated by his lack of interest in her. She starts a rumor that he is gay, and a couple of his coworkers start making crude comments about his presumed sexuality. Darnell finds this unpleasant and wants it to stop.

What are Darnell's options?

1. Ignore the situation and hope it will stop.

Darnell is free to ignore the situation if he chooses, but the behavior is inappropriate and he is not required to put up with it.

2. Ask his coworkers politely to stop.

Darnell is free to ask his coworkers to stop, but stopping the inappropriate behavior is not Darnell's job, and he is not required to inform his coworkers that he does not like the behavior.

3. Tell his coworkers he is not gay and show them pictures of his girlfriend.

It does not matter whether or not Darnell is gay. He is free to discuss the situation with his coworkers, but he is not required to inform anyone about his sexual orientation.

4. Report the problem to a supervisor, manager, or AA Officer.

Unless he is a supervisor, Darnell is not required to report the behavior but he should consider doing so. This inappropriate behavior is no doubt distracting to others and detracts from a good working environment. Management needs to be informed of the behavior so that it can be stopped.

Military Status

Military status is defined in Human Rights Law as a person's participation in the military service of the United States or the military service of New York State, including, but not limited to, the armed forces of the United States, the Army National Guard, the Air National Guard, the New York Naval Militia, or the New York Guard.

Military personnel have various protections under the Human Rights Law, N.Y. Military Law (military leave provisions), the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), and the federal Family and Medical Leave Act (FMLA). See the Handbook for more details.

Military Leave and Job Retention Rights

New York Military Law entitles employees to a leave of absence for ordered military duty. It also entitles employees to return to their jobs with the same pay, benefits, and status they would have attained had they remained in their position continuously during the period of military duty.

Scenario: Reporting for Duty

Jesse is a member of the US Army Reserves. He takes leave time to report for duty at his military base, which includes a two- week training each summer. Russ, his coworker, complains to their supervisor that it isn't fair that Jesse gets an "extra paid vacation" each summer "just because he is in the military." Russ feels discriminated against because other workers are not allowed the same amount of time off with pay.

Does Russ have a valid complaint of discrimination?

No.

State employees are given a certain number of days each year, with pay, for this type of military service. Furthermore, having a military status means being in the armed forces. Not being in the military is not a protected characteristic. However, if Russ feels the rules are not being followed in Jesse's case, or wants more information on the rules for military leave, he should contact his agency's Affirmative Action Officer.

Sex

Discrimination on the basis of sex includes:

1. Any type of bias on the basis of sex.
2. Sexual harassment.
3. Sex stereotyping.
4. Discrimination on the basis of pregnancy.

Sexual Harassment

Sexual harassment is defined as any unwanted verbal or physical advance, sexually explicit or derogatory statement, or sexually discriminatory remark that is offensive or objectionable to the recipient, or which interferes with his or her job performance.

A hostile environment on the basis of sex may also be created by words, signs, jokes, pranks, or intimidation of a sexual nature that may be directed at an individual because of his or her sex.

Quid pro quo sexual harassment occurs when a person in authority tries to trade job benefits for sexual favors.

A statewide policy prohibiting sexual harassment in state workplaces is established by Governor's Executive Order. Each state agency must have a written policy and procedure for sexual harassment, and you may request this policy and procedure from your agency's Human Resources Department or Affirmative Action Officer.

Sex Stereotyping

Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of either sex should act or look. Making employment decisions based on sex-stereotyped evaluations of conduct, looks, or dress is sex discrimination.

Harassment because a person does not conform to gender stereotypes is sexual harassment.

Pregnancy Discrimination and Paternity Leave

Discrimination on the basis of pregnancy constitutes sex discrimination. Any condition related to pregnancy that does prevent the performance of job duties entitles the individual to reasonable accommodation, including time off consistent with the medical leave policies applicable to any disability.

Any parent of a newborn child, a newly adopted child, or a sick child is entitled to available child care leave without regard to the sex of the parent. Only the individual who gives birth, however, is entitled to any medical leave associated with pregnancy, childbirth, and recovery.

BFOQ

Both state and federal law permit consideration of sex in employment decisions when it is a bona fide occupational qualification (BFOQ). This is, however, an extremely narrow exception to the antidiscrimination provisions of Human Rights Law. Neither customer preference nor stereotyped and generalized views of ability based on sex can form the basis for a BFOQ. However, proof that employing members of a particular sex would impinge on the legitimate personal privacy expectations of an agency's clients, particularly in a custodial environment, may make a case for a BFOQ.

Scenario: Gender-specific Skills?

Roberto is a counselor at a residential youth facility. He is interested in child development and has taken several courses on the subject. He frequently volunteers to lead sessions on parenting skills. Doug, his supervisor, thanks him but always assigns Nora, his coworker, to do the workshops. When Roberto asks why, Doug tells him that she is the best choice because women understand “this baby care stuff” better.

What should Roberto do?

Contact his agency’s AA Officer.

Parenting skills are not gender specific. Doug’s statement to Roberto is certainly a sufficient reason for Roberto to contact his agency’s Affirmative Action Officer. Employers may not discriminate based on sex stereotypes. Instead of assuming that women understand childcare better, Doug should assign the workshops based on an individual’s ability to teach it. Assigning all of the workshops to Nora is an action that should be investigated and stopped if it is found to be discriminatory.

Scenario: Abuse of Authority

Several people under Philip’s supervision are uncomfortable with his behavior at the office. He often shares stories about his sex life and brags about how he can sexually please any woman. Recently, he has started directing his attention towards Pamela. He loudly compliments her on her legs when she wears skirts and rubs her shoulders when he stands behind her. When she applies for a promotion to another unit, he tells her that he would put in a good word for her if she “takes care” of him.

Is Philip’s behavior sex discrimination?

Yes.

By talking about his sex life at work, Philip is engaging in inappropriate workplace behavior. If women in the office feel uncomfortable or demeaned by his comments, this may constitute hostile environment sexual harassment. Additionally, his behavior towards Pamela, including complimenting her legs and touching her shoulders, if this behavior is unwelcome to Pamela, creates a hostile environment for Pamela, regardless of whether or not she “puts up with it.”

Offering to help Pamela gain a promotion if she “takes care” of him constitutes quid pro quo sexual harassment, which is strictly prohibited in the workplace, regardless of whether or not Pamela takes him up on the offer.

If anyone complains of Philip’s behavior, or if any supervisor or manager knows of his behavior, the agency must investigate and stop his behavior.

What is a Reasonable Accommodation?

An employee with a disability is entitled to reasonable accommodation if it will allow him or her to achieve reasonable job performance of essential job tasks or otherwise enable the employee to

enjoy equal benefits and privileges of employment. A job task is essential if not performing it would fundamentally change the nature of the job. If a function is not essential, then it can be reassigned to another employee if doing so will allow the individual with a disability to perform the job.

A reasonable accommodation is an adjustment or modification made to a job or work environment that enables an individual with a disability to perform the essential functions of his or her job in a reasonable manner, or otherwise enable the employee to enjoy equal benefits and privileges of employment. Some examples include:

1. A modified work schedule.
2. Reassignment of the nonessential functions of the job.
3. Acquisition or modification of equipment.
4. Provision of an accessible worksite.

Interactive Process

The person with a disability must inform the agency of the need for a reasonable accommodation and provide reasonable medical documentation as requested by the agency.

When the need for an accommodation has been established, the employee and the agency should enter into an interactive process to seek an effective solution to the accommodation request.

While the employee can request a particular accommodation, the obligation to provide accommodation is satisfied when the needs of the person with a disability are met.

The agency decides which reasonable accommodation will be granted, as long as the accommodation effectively enables the employee to perform job duties in a reasonable manner.

Drug- and Alcohol-free Workplace Policy

New York State employees are subject to criminal, civil, and disciplinary penalties if they distribute, sell, attempt to sell, possess, purchase, or use controlled substances while at the workplace or while acting in a work-related capacity. Such illegal acts, even if engaged in outside of work, may result in disciplinary action. In those locations where it is permitted, an employee may possess and use a controlled substance that is properly prescribed to him or her by a physician. Employees are also prohibited from on- the-job use of, or impairment from, alcohol.

Drug Addiction and Alcoholism as Disabilities

The Human Rights Law protects individuals who are recovered or recovering from drug addiction or alcoholism. Alcoholics may also be protected if the alcoholism does not interfere with job performance. Intoxication or the use of alcohol or illegal drugs on the job is not protected, regardless of disability. Any current use of illegal drugs is not protected. Please see the Handbook for more information on drugs and alcohol and the workplace.

Misconduct

Accommodation of behaviors that do not meet the employer's workplace behavior standards is not required, even if the behaviors are caused by a disability, so long as the standards are consistently applied to all similarly situated employees.

Safety Concerns

Reasonable accommodation is not required where the disability or the accommodation itself poses a direct threat, which means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.

Scenario: Access Denied

Sonja, a supervisor, is planning a workshop on conflict resolution for her unit that will be held on the second floor of a historic building in town. Denise, who had polio and uses crutches, cannot use stairs. After Denise discovers that the location does not have an elevator, she meets with Sonja to talk about the problem. Sonja apologizes for the location not being accessible and assures Denise that she will make sure that future locations are accessible. She then tells Denise that she should not worry about missing the workshop.

What should Denise do?

Contact her agency's AA Officer.

Denise does not have to accept this situation and should contact her agency's Affirmative Action Officer. Although Sonja may have inadvertently located the workshop in an inaccessible location, since she has an employee who will be denied access, she should relocate or reschedule the workshop if there is no other way to fix the problem. Attending the workshop is a term of employment that Denise is entitled to equally with her coworkers.

Predisposing Genetic Characteristics

A predisposing genetic characteristic is defined as any inherited gene or chromosome believed to predispose or significantly increase the risk of an individual or his or her offspring to develop a disease or disability. This information may be determined by a genetic test or inferred from knowledge of an employee or the employee's family member.

Testing for such genetic characteristics is prohibited in most circumstances.

As with all protected characteristics, employment decisions may not be made on the basis of known genetic information or on the basis of a perceived genetic inheritance.

Genetic Testing

No employer may directly or indirectly solicit, require, or administer a genetic test, or solicit or require information from which a predisposing genetic characteristic can be inferred as a condition of employment or preemployment. It is also unlawful for an employer to buy or otherwise acquire the results or interpretation of an individual's genetic test results.

An employee may give written consent to have a genetic test performed for purposes of a worker's compensation claim or to determine the employee's susceptibility to potentially carcinogenic, toxic, or otherwise hazardous chemicals or substances found in the workplace. The employer may not take any adverse action against an employee on the basis of such voluntary test.

Scenario: Family Matters

Carole is a social worker and spends most of her workday completing home visits. Her brother, who also works at her agency, is on medical leave to seek treatment for schizophrenia. Sheila, her supervisor, decides to remove her from home visits and have her work in the office. She tells another supervisor that she is worried that mental illness might affect Carole, and she doesn't want her working directly with families.

What should Carole do?

Contact her agency's AA Officer.

Carole should contact her Affirmative Action Officer. Treating Carole differently—based on a perception of a genetic inheritance, on a perception of disability, or on a belief that there may be a problem in the future because of a disability—are all discriminatory based on genetic predisposition and/or perceived disability. Even if Sheila has observed behavior by Carole that causes concerns about safety, Sheila has not handled the matter properly. She should contact her agency's Human Resources Department to report the matter, which can be handled with an appropriate medical or mental health evaluation, consistent with policies regarding such matters.

Marital Status

Marital status is the condition of being single, married, separated, divorced, or widowed. Employment decisions may not be made based on such status. Examples of marital status discrimination would include an employer's decision to hire only single people for jobs that require long hours or travel, or an employer's decision to limit certain jobs to married people because of a stereotyped view that married people are more responsible.

Marital status does not concern decisions made because of the identity of the person to whom an employee is married. Marital status concerns whether or not an employee is married, and not the individual circumstances of the relationship.

Nepotism

Nepotism means hiring, granting employment benefits, or other favoritism based on the identity of a person's spouse or other relative.

The Public Officers Law, as well as state policy, prohibits a state employee from controlling or influencing decisions to hire, fire, supervise, or discipline a spouse or other relative.

A state employee may also violate the law by using his or her position to seek any advantage or favor from the state for a spouse or relative.

Such antinepotism rules are not marital status discrimination.

Scenario: Office Romance

Rafaela and Walt work in the same unit. They had been dating for some time when Rafaela was promoted, making her Walt's supervisor. Then Rafaela and Walt were married. Walt was transferred to a different unit so that Rafaela would no longer be his supervisor. Walt wanted to remain in his old unit and felt the transfer was discriminatory since the only thing that changed about his circumstances was his marital status.

Was Walt's transfer discrimination on the basis of marital status?

No.

Although Walt was transferred because of his marriage, he was transferred because he was married to his supervisor, not because of his status of being married. Had he married anyone other than his supervisor, he would not have been transferred. The state's antinepotism rules do not permit an employee to be supervised by a spouse or other relative. And, even without application of this specific antinepotism rule, taking any action because of the person to whom an employee is married is not marital status discrimination.

Domestic Violence Victim Status

Domestic violence occurs within a wide spectrum of relationships, including married and formerly married couples, couples with children in common, couples who live together or have lived together, gay, lesbian, bisexual and transgender couples, and people who are dating or who have dated in the past.

Protection for victims of domestic violence is now included in the employment provisions of the Human Rights Law. Also, a Governor's Executive Order requires adoption of domestic violence policies by all executive branch state agencies.

Purpose of Policies on Domestic Violence and the Workplace

Domestic violence can compromise the safety of New York State residents with tragic, destructive, and sometimes fatal results.

The workplace can sometimes be the one place where the victim finds support. Policies on domestic violence and the workplace aim to support the victim in retaining employment and finding the resources necessary to resolve the problem.

Meeting the Needs of Domestic Violence Victims

An employee affected by domestic violence can ask the employer for accommodations related to his or her status. Accommodations can include, but are not limited to, the following:

1. Granting time off to go to court, to move, etc., which should be granted at least to the extent granted for other personal reasons.
2. Granting time off to allow a victim or subpoenaed witness to exercise his or her rights as required pursuant to the Criminal Procedure Law, the Family Court Act, and Penal Law §215.14.

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3. If an abuser of an employee comes to the workplace and is threatening, treating the incident in same manner as any other threat situation. It is not to be treated as just the victim's problem which the victim must handle on her or his own.
 4. Treating an employee's need for time off for a disability caused by domestic violence in the same manner as any temporary disability. This includes time off for counseling for psychological conditions caused by domestic violence.

Workplace Safety Plan

Pursuant to the Executive Order, a state employee is also entitled to have a workplace safety plan in place, to prevent any incidents caused by the abuser coming near the workplace. This might include accommodations like staggering the employee's hours, changing an e-mail address or blocking a telephone number, changing a parking area, and escorts to and from the employee's vehicle.

Scenario: "Go Home and Take Care of Your Problem"

Kelli recently left a violent relationship and has obtained an order of protection. Because she is afraid that her ex-husband will come to the workplace to cause trouble for her, she takes her order of protection to her supervisor, Jon, and explains her situation. She asks that building security be given the order of protection and her ex-husband's photograph, and asks that her office phone number be changed because her ex-husband is calling frequently to harass her. Jon tells Kelli that she had better take time off until she sorts out her personal life because the agency cannot risk the problems that may be caused by her ex-husband.

What should Kelli do?

Contact her agency's AA Officer.

Based on Jon's response to her requests, Kelli should contact her agency's Human Resources Department and/or Affirmative Action Officer for further assistance. Kelli is entitled to have a workplace safety plan, which in this case could include giving the order of protection and a photograph to building security, and changing her office phone number. She is entitled to continue working at her job and should not be required to leave the workplace because of the actions, or threatened actions, of her abuser.

Prior Arrest Records, Youthful Offender Adjudications, and Sealed Records

Under the Human Rights Law, it is an unlawful discriminatory practice for an employer to make any inquiry about any arrest or criminal accusation of an individual, not then pending against that individual, which has been resolved in favor of the accused or resolved by a youthful offender adjudication or resulted in a sealed conviction.

It is unlawful to require any individual to divulge information pertaining to any such arrest or criminal accusation or to take any adverse action based on such an arrest or criminal accusation.

An employee may lawfully be required to provide documentation showing how a prior arrest was resolved, if, for example, such arrest shows up as still pending in a background check.

Pending Arrest or Accusation

As long as an arrest or criminal accusation remains pending, the individual is not protected under the Human Rights Law. The agency may refuse to hire or may terminate or discipline the employee without violating the Human Rights Law, but supervisors and other decision makers should consult with the agency's Human Resources Department or Agency Counsel with respect to rights employees may have under other applicable laws or collective bargaining agreement provisions.

The agency may also question the employee about the pending arrest or accusation, the underlying circumstances, and the progress of the matter through the criminal justice system.

Exceptions

The protections for prior arrest do not apply to an application for employment as a police officer or peace officer. They apply only in part to all other jobs with law enforcement agencies.

Previous Conviction Records

It may be unlawful to deny a license, refuse to hire, terminate, or take an adverse employment action against an individual because he or she has been previously convicted of one or more criminal offenses.

The New York Correction Law, article 23-A, provides the standards to be applied and factors to be considered before an employment decision may be based on a previous conviction. It is the public policy of New York State to encourage the licensure and employment of individuals with previous criminal convictions.

Factors from Correction Law

Correction Law prohibits discrimination unless there is a direct relationship between one or more previous criminal convictions and the specific employment sought or held. It is unlawful to deny someone a job unless there is a direct relationship or unreasonable risk to property, safety, or the welfare of specific individuals.

For more information on the factors an employer must apply in determining if there is a direct relationship or unreasonable risk between an individual and the employment sought, refer to the Handbook.

There are eight factors to be weighed in determining whether such a direct relationship exists that would permit denial of employment or a license. These factors include: the job duties related to the license or employment sought, the bearing the conviction would have on the fitness or ability to perform the job duties, the time elapsed since the criminal offense, the age at the time of the offense, the seriousness of the offense, and any information as to rehabilitation. All eight factors must be considered on a case-by-case basis.

Inquiries and Misrepresentation

An employer may ask an individual to disclose prior convictions as part of the employment application process or at any time during employment. Employment may be denied, or the

employee may be terminated, if the employer learns that he or she misrepresented any information regarding a previous conviction.

Scenario: A Drug Problem?

Peter works as a nurse in a medical facility. He was arrested for possession of a controlled substance and is currently out on bail. Between his arrest and court date, he continues to come to work. The supervisors in his unit meet to talk about his arrest and decide to write him up for termination and, given the nature of the charge, to seek immediate suspension since he has access to drugs in the workplace.

Are Peter's supervisors discriminating against him?

No.

While Peter's arrest or criminal accusation remains pending, he is not protected by the Human Rights Law. His employer can choose to suspend and/or terminate him under these circumstances if done in accordance with the provisions of other applicable laws and collective bargaining agreements. The agency may also immediately conduct an investigation into the circumstances underlying his arrest.

If instead the agency took no action to terminate or investigate during the pendency of the arrest, then if Peter is acquitted or is convicted but the record is sealed, the agency can take no action against him at that point.

Scenario: A Drug Problem? Part 2

While Peter is suspended, pending his termination hearing, he takes a plea, resulting in a conviction which is not sealed. Peter completes drug rehab, and then asks to be allowed to return to work and to have his termination reduced to a lesser penalty. He says that he is now "clean" and qualifies as a recovering drug addict and seeks accommodation of his disability. The agency does not allow Peter to return to work and proceeds with the process of terminating him.

Is this discrimination based on prior arrest?

No. Peter's arrest was not resolved in his favor or with a sealed conviction. Therefore his arrest record is not protected under the Human Rights Law.

Is this discrimination based on prior conviction?

No. Peter's conviction is not considered a prior conviction because it occurred while he was employed. He is not protected from his employer's actions taken in response to his current conviction.

Is this disability discrimination?

No. Peter was using illegal drugs while he was employed, and this behavior is not protected even if it was caused by the disability of addiction. If Peter's job was different, and he would not have

access to drugs if he returned to work, then the employer could choose to permit him to return to work, with a “last chance” agreement that he remain drug-free or face immediate termination.

Gender Identity

Gender identity refers to an individual's self-image, appearance, behavior, or expression, even if it is different from that traditionally associated with the legal sex or gender assigned to an individual at birth.

State employees are protected with regard to their gender identity by Governor’s Executive Order.

Human Rights Law

Discrimination on the basis of gender identity may give rise to a claim of sex or disability discrimination under the Human Rights Law, under certain circumstances.

Sex

Under long-standing New York law, it is sex discrimination to refuse to recognize a person’s surgically-reassigned gender as his or her true gender.

Disability

An employee who has "gender identity disorder" or "gender dysphoria" may have protection on the basis of disability.

Scenario: An Unwelcoming Promotion

Gwen recently accepted a promotion at a new office. After finding out that she is transgender, her new coworkers started asking her what her “real name” is and using the pronoun “he.” When Gwen complained to her supervisor about the harassment, he said, “You were born a man, so naturally they are curious about you and just need time to adjust.”

What should Gwen do?

Contact her agency’s AA Officer.

The behavior of her coworkers may be harassment on the basis of gender identity, a violation of the Executive Order policy on gender identity. Regardless of whether the harassment is currently severe and pervasive enough to create a hostile work environment, her supervisor needs to take her complaint seriously by reporting it to management and taking steps to end her coworkers’ inappropriate behavior. Gwen is free to give her coworkers more time if she chooses, but she is entitled to complain to the agency’s Affirmative Action Officer because her complaint to her supervisor was rebuffed when it should have been acted upon and because of the harassment she is experiencing.

The harassment may be also unlawful harassment on the basis of sex and/or disability under the Human Rights Law. There is further explanation in the *Handbook*.

Retaliation

The Human Rights Law protects an employee who has engaged in “protected activity” from being retaliated against in any manner.

Protected activity includes:

1. Making a complaint to a supervisor, manager, or Affirmative Action Officer about discrimination.
2. Filing a formal complaint of discrimination.
3. Testifying or assisting in any proceeding under any antidiscrimination law.
4. Opposing any of the discriminatory practices discussed in this training.

An individual who engages in any of the above activities, when in fact there is no violation of the law, is protected if he or she had a good faith belief that discrimination had occurred.

What is Retaliation?

Retaliation can be any negative action taken against the employee by the employer, which is more than trivial, that could have the effect of discouraging a reasonable worker from making a complaint about discrimination.

The negative action need not be job-related or occur in the workplace, and it can even occur after the employee no longer works for the agency.

What is Not Retaliation?

A negative employment action is not retaliatory merely because it occurs after the employee engaged in protected activity. Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity. In order to establish a claim of retaliation, an individual must be able to show that the adverse action was motivated by the protected activity.

Committing to a Discrimination-free Workplace

New York State is committed to creating discrimination- and harassment-free workplaces for all of its employees. This course provided you with an overview of the protections afforded to all state employees.

State employees have an obligation to avoid any behavior in the workplace that frustrates the state’s goal of providing a bias-free workplace. State employees are encouraged to report any discrimination or harassment that they are aware of to their supervisor, manager, or Affirmative Action Officer.

All supervisors and managers are required to report any discrimination or harassment of which they become aware, so that the agency may enforce its antidiscrimination policies by conducting a prompt and thorough investigation and taking appropriate remedial action if necessary.

The publication Equal Employment Opportunity in New York State: Rights and Responsibilities: A Handbook for Employees of New York State Agencies provides additional information on each of the protected characteristics covered in this course.

Equal Employment Opportunity in New York State: Rights and Responsibilities: A Handbook for Employees of New York State Agencies - http://www.goer.ny.gov/Employee_Resources/employee_handbook/2011Employee_Handbook.pdf

If you want to file a complaint, you should request information on your agency's policies and procedures for complaints from your Affirmative Action Officer, or your Human Resources Department. The Handbook also contains information about filing a complaint outside your agency.

Summary

Let's review what you learned in this course.

- New York State prohibits discrimination and expects its agencies to create discrimination-free work environments.
- All employees must refrain from discriminatory conduct.
- No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's protected characteristics, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

Congratulations!

You have now completed Equal Employment Opportunity: Rights and Responsibilities.
